BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEROY PREWITT, JR.	)	
Claimant	)	
VS.	)	
	)	
SAM'S WHOLESALE CLUB	)	Docket No. 1,061,524
Respondent	)	
AND	)	
	)	
ILLINOIS NATIONAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 18, 2013, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery. George H. Pearson of Topeka, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 14, 2013, preliminary hearing and exhibits thereto; the transcript of the November 9, 2012, preliminary hearing; the transcript of the September 14, 2012, preliminary hearing and exhibits thereto; the transcript of the January 7, 2013, deposition of claimant and exhibits thereto; the transcript of the January 7, 2013, deposition of Linnisa Curtis-Prewitt; the transcript of the December 12, 2012, deposition of David L. Couch, ARNP-BC, and exhibits thereto; the transcript of the December 6, 2012, deposition of Jennifer Schmidt, PA, and exhibits thereto; the transcript of the November 9, 2012, deposition of Martha Cunningham; the transcript of the November 9, 2012, deposition of Douglas Millett and exhibits thereto; the transcript of the November 9, 2012, deposition of Michael Minner and exhibits thereto; the transcript of the October 11, 2012, deposition of Michael Minner; and all pleadings contained in the administrative file.

ISSUES

Claimant alleged that on June 19, 2012, he sustained a right knee injury cleaning out a grease trap during the course of his employment with respondent. ALJ Avery agreed

with claimant and found that the accident was the prevailing factor causing the injury, disability and need for medical treatment. ALJ Avery ordered respondent to provide claimant temporary total disability benefits and medical treatment with Dr. Lowry Jones. ALJ Avery made a specific finding that claimant was a credible witness.

Respondent appeals and asserts claimant did not meet with personal injury by accident arising out of and in the course of his employment. Respondent also contends that claimant's alleged accident was not the prevailing factor causing claimant's injury and need for medical treatment. Claimant asks the Board to affirm the ALJ's preliminary hearing order.

The issue before the Board is: did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's alleged work accident the prevailing factor causing the injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the September 14, 2012, preliminary hearing, claimant; claimant's wife, Linnisa Curtis-Prewitt; claimant's mother, Martha Cunningham; and respondent's store manager, Douglas Millett, testified.

Claimant worked in the meat department for respondent. One of his job duties was to clean a grease trap, which required claimant to remove an overflow jug filled with accumulated chicken fat and water. On June 19, 2012, after cleaning the grease trap, claimant knelt down and was lifting the overflow jug when his right "knee jumped out of place."[1] Claimant estimated the container weighed between 55 and 60 pounds. Claimant felt a pain on the side and middle of his right knee.

The incident occurred shortly before claimant's shift ended. He finished the shift and did not tell anyone of the injury. Claimant testified that after the accident, he had a little limp. On cross-examination, claimant testified that on a scale of one to ten with ten being the worst pain, immediately after the accident his pain was a nine. When claimant left work that day, he purchased supper at one of the cash register stations.

The day after the accident, claimant was off work. Claimant told his mother of the injury and claimant treated the right knee using advice from his mother. When claimant awoke on June 21, 2012, the right knee had swollen considerably, so claimant went to

[1] P.H. Trans. (Sept. 14, 2012) at 49.

Stormont-Vail Healthcare for treatment. That evening, after seeking treatment at Stormont-Vail, claimant went with his wife and mother to the store where he worked and reported the injury. When claimant arrived at the store, he used a wheelchair. Claimant testified that he reported the accident because a woman at Stormont-Vail told claimant that he should report the injury. After reporting the injury, claimant was told to return to respondent the next day, June 22. When claimant came back on June 22, he was instructed to see the workers compensation doctor and undergo a urinalysis. Claimant was accompanied to the workers compensation doctor by his wife and Danny Page, the meat department manager for respondent.

Claimant denied having any right knee aches or pain prior to June 19, 2012.

Douglas Millett, manager of the store where claimant worked, testified that on June 21, 2012, he met with claimant, claimant's mother, claimant's wife, and Toneesha Hackney in Human Resources. Mr. Millett testified that claimant's wife was writing out a statement of what happened. Mr. Millett read the statement and it stated claimant had a prior accident on June 5. Mr. Millett indicated that he needed more specifics, such as whether the accident happened at work.

Claimant's wife, Linnisa Curtis-Prewitt, acknowledged that she had prepared a written statement that indicated claimant's accident was on June 5, 2012, but testified she had the dates mixed up. Ms. Hackney indicated the written statement was not accurate, so claimant's mother tore it up.

Ms. Curtis-Prewitt testified that when claimant came home from work on June 19, 2012, he told her about injuring his right knee while cleaning the grease trap. Ms. Curtis-Prewitt denied that claimant had any right knee pain prior to June 19, 2012.

Claimant's mother, Martha Cunningham, testified that on June 19, 2012, claimant called and told her of sustaining a right knee injury while cleaning a grease trap at work. Ms. Cunningham advised claimant to treat the injury by placing his leg in a tub containing warm water with Epsom salt and grain alcohol.

Ms. Cunningham was present on June 21, 2012, when claimant reported the accident to Mr. Millett. She tore up the original written statement prepared by claimant's wife, because a gentleman said it was the wrong paper. Ms. Cunningham had no idea why Ms. Curtis-Prewitt listed June 5 as the accident date on the original written statement. Ms. Cunningham also denied that claimant had any right knee pain prior to June 19, 2012.

At the September 14, 2012, preliminary hearing, claimant introduced the report of Dr. Edward J. Prostic, who saw claimant on August 17, 2012, at the request of claimant's attorney. Claimant gave a history to Dr. Prostic of sustaining a right knee injury on June 19, 2012, while cleaning a grease trap for respondent and denied having any previous right knee difficulties. Dr. Prostic indicated that it was unclear if the injury was a

tear of the medial meniscus, a subluxation of the patella or a snap of the medial patellar plica. He recommended claimant undergo an MRI. It was the opinion of Dr. Prostic that claimant's June 19, 2012, work-related accident was the prevailing factor causing the injury, medical condition and need for medical treatment.

At the September 14, 2012, preliminary hearing, the ALJ held the record open so the parties could depose additional witnesses.

Deposition testimony of witnesses

Jennifer L. Schmidt testified that on June 21, 2012, she was a physician's assistant working at Stormont-Vail under the tutelage of Dr. Kyle Garrison. On that date, claimant sought treatment at Stormont-Vail at 10:49 a.m. and was discharged at 12:45 p.m. Ms. Schmidt took a history from claimant. The Stormont-Vail records stated: "Pt presents c/o right knee pain, swelling, and 'locking' x 3 weeks. Pt had bent down to unclog the 'grease trap' at his work and felt a 'pop' in the right knee. . . ."[2] The records also state: "Episode onset: 3 weeks ago. The problem occurs daily. The problem has been gradually worsening. . . ."[3]

Ms. Schmidt testified that claimant was instructed to notify his employer of the work injury. The records from claimant's June 21 visit at Stormont-Vail include a note from nurse Susan Swords that claimant denied having a workers compensation injury. Ms. Schmidt confirmed that Ms. Swords also indicated that claimant injured his right knee at work when he bent down to do something.

Claimant deposed David L. Couch, a nurse practitioner, who first saw claimant at Stormont-Vail WorkCare on June 22, 2012. Mr. Couch indicated that claimant gave a history of his right knee popping on June 19, 2012, when he was changing a grease trap. Initially, claimant did not think the injury was severe, but within a day it was more bothersome. Mr. Couch prescribed a treatment plan of anti-inflammatory medications, ice and elevation. Claimant was also placed on modified duty of no kneeling, squatting, or climbing. Claimant could work seated with the right knee elevated.

Mr. Couch was questioned extensively about a statement he made in his June 22, 2012, notes that says: "It cannot be determined at this time whether this problem is work related or not. Have conflicting statements as to the injury occurring at home or work."[4] Mr. Couch thought claimant might have a meniscus tear, but he could not do a complete exam due to swelling. Mr. Couch indicated the mechanism of a meniscus tear from

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[2] Schmidt Depo., Ex. 2.

[3] *Id.*

[4] Couch Depo., Ex. 1.

squatting is questionable, unless claimant had a preexisting injury or preexisting degenerative changes in the right knee joint. Mr. Couch testified that his nurse manager had been told by "the company"[5] that claimant had commented to co-workers that the right knee injury had occurred at home. Ron Crane, another of respondent's managers, and Mr. Couch also spoke about claimant's accident. Mr. Crane also indicated to Mr. Couch that claimant may have injured his right knee while mowing his lawn. Mr. Couch opined that from the amount of swelling in claimant's right knee, claimant either injured his knee close to June 22 or exacerbated the injury that occurred two weeks earlier. However, Mr. Couch did not know if claimant had sustained a right knee injury two weeks earlier. On June 29, Mr. Couch performed a McMurray's test that showed possible evidence of a meniscal tear, but an MRI has not been conducted to confirm the tear.

Mr. Couch opined that rising from a kneeling position, as claimant did when he cleaned the grease trap, was not the prevailing factor causing the injury. Claimant's attorney objected, as Mr. Couch is not a medical doctor. Mr. Couch agreed that he would have a higher index of suspicion that the mechanism of claimant's accident caused the right knee injury if claimant was rising and twisting to turn and carry the grease trap.

Michael D. Minner, asset protection manager at the store where claimant worked, was deposed on two occasions. He testified that the store where claimant worked had a camera surveillance system in place on June 19, 2012. It was Mr. Minner's impression that claimant was alleging that the accident occurred between 3 and 4 p.m. on June 19. Mr. Minner provided foundation evidence for a CD that was introduced as an exhibit at the February 14, 2013, preliminary hearing. On the CD are four separate video recordings made on June 19, with claimant in them and several photos of respondent's store. One video recording was of the meat market from 4:30 p.m. to 4:38 p.m., another showed claimant purchasing a meal at 5:07 p.m. on the way out of the store, and a third showed claimant leaving the store a few moments later. There was a fourth video recording of an area where customers could sit and eat meals they had purchased.

Claimant testified that he went to work on June 21, 2012, at 7 a.m. to get his paycheck and left. At the time, although his right knee was swollen, claimant was planning on going to work. Claimant did not report the injury, because he did not think the right knee was an issue. The swelling in claimant's right knee did not subside and the pain began bothering him, so later that morning he sought medical treatment at Stormont-Vail. Claimant denied telling Ms. Schmidt of developing right knee symptoms in the three weeks prior to June 19, 2012. Claimant testified he told personnel at Stormont-Vail that he hurt his right knee on the job. He did not seek medical treatment on June 19 and 20, 2012, because he did not think the right knee injury was "that bad."[6]

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[5] *Id.* at 9.

[6] Claimant Depo. at 6.

Claimant testified that when he reported the accident later in the day on June 21, 2012, his wife wrote what happened on a blank piece of paper provided by Ms. Hackney, who worked in Human Resources as indicated above. After claimant's wife completed the written statement, they were told it was not detailed enough, so claimant's mother tore up the written statement. Claimant's wife then began writing what happened on a second blank piece of paper. They were told that a different form had to be used, so claimant's mother tore up the second written statement. Finally, a form entitled "Associate Statement - Workers Compensation"[7] was provided to claimant and he, not his wife, completed it.

Ms. Curtis-Prewitt indicated at her deposition that she accompanied claimant to Stormont-Vail on June 21, 2012, and was with him in the room when he was examined. Ms. Curtis-Prewitt testified that she did not remember anyone telling Stormont-Vail personnel that claimant had an onset of knee symptoms three weeks earlier. Ms. Curtis-Prewitt recalled that claimant told Ms. Schmidt of injuring the right knee at work.

Ms. Cunningham was deposed, but her testimony about the events that occurred when claimant reported the accident on June 21, 2012, was similar to her preliminary hearing testimony and need not be repeated. She also testified that claimant's wife wrote out two separate versions on a blank sheet of paper of what occurred when claimant was injured. Both times Ms. Cunningham tore up the documents, because they were not the correct form. She indicated that she read neither document before tearing them up.

Mr. Millett testified that the two original statements written by claimant's wife were retrieved from the trash by Mr. Minner. Some of the pieces were not readable because they were covered in chocolate milk. The torn salvageable pieces were assembled and made exhibits to Mr. Millett's deposition transcript. The first written statement has the date June 5, 2012, but also appears to contain a second date of June 19, 2012. It also indicated claimant took Tylenol on June 20 and went to the emergency room on June 21, 2012. The second written statement discusses claimant's job duties on June 19, 2012, but does not mention the accident or cleaning the grease trap. Mr. Millett testified that he believed from the first written statement made by Ms. Curtis-Prewitt that claimant was injured prior to June 19, 2012.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of

[7] *Id.*, Ex. 5.

[8] K.S.A. 2011 Supp. 44-501b(c).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[9]

Respondent raises five separate arguments in its brief as to why claimant failed to prove that his injury by accident arose out of and in the course of his employment. First, respondent asserts that the video recordings do not provide evidence of a work-related injury. This Board Member finds the video recordings have little probative value.

The first video recording is of the meat department from 4:30 p.m. to 4:38 p.m. on June 19, 2012. Mr. Minner believed claimant's accident occurred between 3 and 4 p.m. Claimant testified that he injured himself shortly before the end of his shift. After claimant's shift ended, he bought his supper at 5:07 p.m. Therefore, it is uncertain if video recording of the meat department was made before or after claimant's accident. The video recordings of claimant buying supper and leaving the store show claimant walking only a few steps.

Respondent's second argument is that claimant's actions on June 21, 2012, are inconsistent with him having a work injury. Respondent questions the fact that claimant picked up his paycheck in the early morning of June 21, did not mention a right knee accident, and a few hours later went to the emergency room at Stormont-Vail. Claimant's explanation that his right knee swelling did not subside and the pain began bothering him is plausible and uncontroverted.

The third argument of respondent is that claimant provided inconsistent dates of injury. The first two written statements were prepared by claimant's wife, not claimant. The first written statement contains the date June 5, 2012, but is incomplete. The second written document is also incomplete, but contains only one date, June 19, 2012. There is insufficient evidence to show that Ms. Curtis-Prewitt listed June 5, 2012, or another date as claimant's date of accident. The form that was completed by **claimant** (emphasis added) lists June 19, 2012, as the accident date.

Respondent's fourth contention is that medical records from Stormont-Vail are inconsistent with claimant's testimony. This contention is only partially true. Stormont-Vail's June 21, 2012, records indicated that claimant developed right knee symptoms three weeks earlier. Claimant testified he never said that to anyone at Stormont-Vail. On the other hand, claimant maintained that he told Stormont-Vail personnel of sustaining a work-related injury. That testimony was corroborated by Ms. Schmidt, a physician's assistant at Stormont-Vail, who urged claimant to report the accident to his employer.

[9] K.S.A. 2011 Supp. 44-508(h).

The fifth argument of respondent is that the mechanism of accident is inconsistent with a meniscal tear. That assertion is based upon the testimony of Mr. Couch, who is not a medical doctor. When Mr. Couch last saw claimant, he had not undergone an MRI to determine the exact nature of his right knee injury. As pointed out by Dr. Prostic, an exact diagnosis of claimant's right knee injury is unknown and claimant should undergo an MRI.

Claimant has consistently testified that his right knee injury was the result of lifting the overflow jug while cleaning the grease trap. Stormont-Vail's June 21, 2012, notes indicate claimant reported a work injury. Dr. Prostic opined that claimant's June 19, 2012, accident was the prevailing factor causing his injury and need for medical treatment. That opinion is uncontroverted by another medical expert. Simply put, claimant has met his burden of proving that he sustained a right knee injury by accident on June 19, 2012, arising out of and in the course of his employment and that the accident was the prevailing factor causing his injury and need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, the undersigned Board Member affirms the February 18, 2013, preliminary hearing Order for Compensation entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of May, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

[10] K.S.A. 2012 Supp. 44-534a.

[11] K.S.A. 2012 Supp. 44-555c(k).

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Brad E. Avery, Administrative Law Judge